BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Fruitridge Vista Water Company, a trust, for an order: 1) establishing a moratorium on new service connections; and 2) clarification of Tariff Rule 15 regarding payment for new facilities servicing new applicants.	Application 05-10-005 (Filed October 7, 2005)
Sacramento Housing and Redevelopment Agency and the Housing Authority of the County of Sacramento, Complainants, vs. Fruitridge Vista Water Company, Defendant.	Case 05-10-007 (Filed October 11, 2005)
County of Sacramento, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-10-011 (Filed October 7, 2005)
David R. Gonzalez & Donna L. Gonzalez, Complainants, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-011 (Filed September 6, 2005)
Mercy Properties California, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-012 (Filed September 6, 2005)
Victoria Station, LLC, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-027 (Filed September 22, 2005)
Park Place LLC, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-11-015 (Filed November 15, 2005)

THE DIVISION OF RATEPAYER ADVOCATES' APPLICATION FOR A REHEARING

I. INTRODUCTION

Pursuant to the Article 21 of the Commission Rules of Practice and Procedure (Rule), Rule 85 et seq., the following Parties hereby apply for rehearing of Commission Decision (D.) 06-04-073:

- Division of Ratepayer Advocates (DRA); and
- Assemblymember Dave Jones, who represents the Ninth Assembly district of California, and in March 13, 2006 hearing of this matter, appeared as a DRA sponsored witness.[1]

Pursuant to Rule 54 and the Commission Order Instituting Rulemaking (OIR) 06-02-011, dated February 23, 2006, Assemblymember Jones is a party to this proceeding and may join DRA in filing this Application. At the March 13, 2006 hearing, DRA presented Assemblymember Jones as a witness whose constituency consists of ratepayers served by FVWC. No objections were raised as to the relevancy and materiality of Assemblymember Jones' testimony, who opposed Commission approval of the proposed settlement. Therefore, Assemblymember Jones joins as a party in filing this Application for Rehearing.[2]

II. THE ISSUES

A. Is the Commission in D. 06-04-073 acting reasonably, consistent with the law, and in the public interest when it authorizes adding $1.98 million to rate base, for which the record establishes that FVWC is not expending any of its

[1] DRA and Assemblymember Dave Jones are hereafter collectively referred to as the Applicants. The Ninth Assembly district encompasses the City of Sacramento and portions of the County of Sacramento. TR. 31-32, D. Jones/ DRA.

[2] OIR 06-02-011, "Rulemaking to Update, Clarify and Recodify Rules of Practice and Procedure," 2006 Cal. PUC LEXIS 80, at *195, filed Feb. 16, 2006 (proposed Rule 16.2(c): "Except as may be specifically authorized by statute, a person may not become a party by filing an application for rehearing.")

own funds and the Sacramento City financing of the $1.98 million "buy-in fee" is not established.

B. Is the Commission in D. 06-04-073 acting reasonably, consistent with the law, and in the public interest, when the Commission approves in advance adding to rate base up to $5 million of damage awards that is expended on infrastructure, without having to prove that the damage awards belong to FVWC and not the ratepayers or even showing the reasonableness and prudency of such increase.

C. Is the Commission in D. 06-04-073 acting reasonably, consistent with the law, and in the public interest, when it bars any future Commission or an interested party from reviewing, modifying, or rescinding the rate base increases of $1.98 million and up to $5 million.

III. BACKGROUND

A. The Ratepayers

FVWC serves a population of approximately 15,000 with 4,800 service connections in an unincorporated area of approximately four square miles which is adjacent to the Southern boundary of the City of Sacramento in Sacramento County. The service area is bounded on three sides by the City of Sacramento's water system and on the South by the California Water Service Co.[3]

FVWC's ratepayers are mostly residential customers with some commercial and light industrial businesses. According to U.S. Census data, the median household income in 1999 was $28,227. However, the per capita income in 1999 of the FVWC ratepayers was $11,836 annually, and 59 percent of the households in the FVWC service area have incomes less than 200 percent of the federal poverty level in 1999.[4]

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[3] Ex. 1, *DRA Dir. Testimony* at 2; and *Re FVWC*, Comm. Res. W-4252, 2001 Cal. PUC LEXIS 638, at *14 – *15 (dated June 4, 2001)("In the unincorporated areas known as Fruitridge Vista Units, Sandra Heights, Pacific Terrace Units, Bowling Green Units, and all immediately adjoining territory in Sacramento County including all territory contiguous to the southerly limits of the City of Sacramento.")

[4] TR 31:13 –32:23, D. Jones/DRA; Ex. 2, U.S. Census data re FVWC service area/ DRA.

B. Rate increases by nearly 112% over present level.

Most of FVWC's ratepayers are residential customers who currently pay a monthly flat rate of $15.69. The Commission in D. 06-04-073 authorizes immediately increasing rate base by $1.98 million to earn a 11% rate of return, based on the "assumption" that Sacramento City will finance $1.98 million as a "buy-in fee." As a result, current monthly rates would rise by $4.38. With an additional surcharge of $2.18 authorized for repayment of the State Revolving Fund (SRF) loan, the total incremental increase amounts to $6.56/month. In sum, the residential monthly rate would rise from $15.69 to $22.25, an increase of nearly 42% over present rates.[5]

The Commission in D. 06-04-073 further authorizes an increase of up to $5 million to earn a 10% or higher rate of return, when and if FVWC wins sufficient damages in its MTBE/TBA pollution lawsuit to spend up to $5 million for infrastructure improvements.[6] This rate base increase will raise monthly rates by $11. Taking into account both the $1.98 million and the $5 million rate base increases, the present monthly rate of $15.69 will rise to $33.25/month, or 112% increase over present rates.[7]

C. History of infrastructure improvements.

FVWC's groundwater resources consist of a total of 17 wells, of which only 13 are presently active.[8] In addition, FVWC has 50 miles of mains; has no large storage

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[5] Ord. Para. 2, *D. 06-04-073* at 31, mimeo, citing Attach. A of Ex. 1, the PS.

[6] *Id.* at 31, Ord. Para. 3.

[7] DRA calculates that because a $2 million rate base increase would result in a $4.38/month, then a $5 million increase would be 2.5 times $4.38 = $10.95/month increase. Find'g of Facts 26, *D. 06-04-073* at 29, mimeo, states:

> If and when $5 million is added to rate base through monies recovered in pollution litigation, flat rates for the majority of Fruitridge's customers could increase to approximately $30, depending on the calculation of rate base at the time.

[8] Four of these wells are not in use at this time – Nos. 11, 12 are inactive, No. 15 is standby and No. 2 is "off line" (inactive) due to toxic contaminations of MTBE, PCE and concerns over TCE, iron and manganese. The settlement agreement requires Wells No. 1, 2, 11, and 12 be destroyed.

tanks but depends on pumps proximately located next to its wells for adequate water pressure; and has a present rate base of $1 million.[9]

For the past six years despite pumping equipment problems and compliance citations,[10] FVWC has made no infrastructure improvements and has not applied to the Commission for rate recovery of infrastructure improvements.[11] The last FVWC general rate increase was by advice letter dated April 4, 2000 (AL). FVWC was not requesting rate recovery for capital additions to rate base, but instead wanted to increase its revenue requirement to provide for an increase in management salaries which for the Test Year 2000 was claimed as $190,000, as follows: "$85,000 for the Financial Manager," Robert Cook Sr.; "$90,000 for the General Manager," Robert Cook Jr.; and $15,000 as extra compensation to the General Manager for dealing with specific issues relating to the MTBE contamination of FVWC's wells.[12] On June 14, 2001, in Commission Res. W-4252, the Commission approved FVWC's salary requests of $90,000 and $85,000, but denied the $15,000 extra compensation.[13]

D. FVWC's pollution lawsuit.

In May 2001, FVWC filed a pollution lawsuit in the Sacramento County Superior Court against more than a dozen "corporate members of the gasoline industry," such as Exxon Corporation and Atlantic Richfield Co. FVWC alleges that the defendants contaminated its groundwater resources and water system with MTBE/TBA. The jury trial of this lawsuit involves more than 20 law firms, began on April 17, 2006, and is

[9] *See* D. 06-04-073 at 2, mimeo.

[10] *See* notes below 16 – 21, during the period 2003 to 2005, both CRWQCB and DHS had cited FVWC from water regulations violations.

[11] *See* TR 8:24 – 28; 13:22 – 14:5, Cook/FVWC (since 2000, FVWC has not applied for another rate increase). According to DRA findings, between 1998 and 2003 the approximate investments by FVWC owners in the system has been $431,000 and total depreciation, $659,000. *See* Ex. 8, *DRA Reply Testimony,* at 14-15.

[12] *Re FVWC,* Append. E, Comm. Res. W-4252, 2001 Cal. PUC LEXIS 638, at *1–*3 and *29–*30 (dated June 14, 2001).

[13] *Id.*

expected to take months to end, not including the likely appellate court appeals before a final decision is rendered.[14]

FVWC represents that shareholders have borne all of the litigation risk, and no ratepayer funding for the litigation has been sought or provided.[15] When in February 2006, DRA requested data showing the amount and date of any legal expenses and settlements realized by FVWC from its pollution lawsuit during the period 2001–2004, FVWC referred to Schedule B-5 of its filed Commission Annual Reports for that period.[16] However, pages from FVWC's 2003 Annual Report, which were entered into the record as Exhibit 10, show ratepayers paid for the litigation expenses and do not state any settlement income. At the hearing, FVWC presented no evidence of having received any settlements from 2001–2006.

E. FVWC's non-compliance with water quality and safety regulations.

On January 6, 2003, the California Regional Water Quality Control Board (CRWQCB) ordered FVWC to develop new water supply to allow Fruitridge Vista to serve current users and new development projects in its service territory. FVWC was also directed to submit a technical Report of Findings that included testing and analyses of the pollution contamination affecting wells 1, 2, 11, and 12.[17] FVWC has failed to comply with the CRWQCB order for the past three years and does not anticipate compliance until 2007.[18]

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[14] "MTBE" means methyl tertiary butyl ether; "TBA," tertiary butyl alcohol. *See* "Fifth Amended Complaint," in *D.J. Nelson, Trustee et al. dba FVWC vs. Atlantic Richfield Co. et al.*, case no. 02AS00535, Sacramento Cnty Sup.Ct , on file with DRA; *also*, FVWC letter from R. C. Cooke to M.R. Bragen dated Feb. 28, 2006 (on file with DRA), data response to DRA data request; *and*, Ex. 8, *DRA Reply Test.* at 15, *ref.* Court Clerk of the Sacramento County Sup. Ct., "the FVWC lawsuit begins trial on April 17, 2006."

[15] Ex. 1, *Prop. Settlmt* at 16.

[16] FVWC letter dated Feb. 28, 2006.

[17] *See* Ex. 1, *Prop. Settlmt* at 22, mimeo; *D. 06-04-073* at 4, mimeo.

[18] D. 06-04-073 at 10, mimeo.

On August 29, 2005, the California Department of Health Services (DHS) issued FVWC an Order to Correct Noncompliance, or Compliance Order No. 01-09-05-C0-002 (Order). From May 2002 to June 2003, the DHS recorded 25 instances of low pressure violations.[19] In June 2004, a DHS field inspection found that FVWC system's source capacity was approximately 75% of the required minimums and met only 87% of the fire flow requirements (excluding any other water usages) for a system of this size and type.[20] In a 2004 Compliance Order No. 04-01-05-CO-002 (DHS Order), DHS concluded that "FVWC has not demonstrated the ability to consistently and safely maintain a minimum operating pressure of 20 psi in the distribution system."[21] DHS found that FVWC failed to maintain adequate and safe water pressure in its distribution system, largely due to having to take several wells out of service because of MTBE contamination. DHS ordered FVWC to identify and provide "additional source(s) of supply (i.e., groundwater or purchased water) in order to provide adequate supply and pressure in the distribution system."[22] FVWC did not contest these facts.[23]

F. The FVWC application for a moratorium.

In September and October 2005, six complainants — the Sacramento Housing & Redevelopment Agency, the County of Sacramento, and several developers — formally complained to the Commission, when FVWC refused to provision them water.[24] On October 7, 2005, FVWC applied to the Commission for a moratorium on new service connections and authority to impose mandatory rationing until distribution in response to the complaints. In general, the complaints assert that a $1.8 million grant is available from an MTBE contamination fund administered by DHS and that this money should be

[19] Ex. 7, DRA Dir. Testimony at 2 note 3.

[20] *Id.*, at 2.

[21] *Id.*, at 3.

[22] Ex. 7, DRA Dir. Testimony at 2.

[23] *See* TR 121: 19 – 122:16, K. Evans/ DRA.

[24] *See* FVWC Op. Brf. at 4 and D. 06-04-073 at 5-6, mimeo.

used to permit importation of available water from the City of Sacramento.[25] FVWC responded that there were less costly alternatives than the DHS grant.[26] On October 27, 2005, the Commission consolidated the five complaints and the application for a moratorium. The parties invoked the Commission's mediation process which occurred in from December 2005 to February 2006.[27]

G. The Scope of the Proceedings

On December 14, 2005, the Commission issued the Scoping Memo in this matter, which inter alia stated that "[t]he scope of this proceeding is governed by Pub. Util. Code §§ 2701 through 2714 and by the assertions in the application and complaints." The specific issues established by the Scoping Memo did not include increasing rate base by $1.98 million and $5 million. The only ratemaking issue presented was as follows:

> What is the effect of Tariff Rule 15, concerning authority to deny connections until the utility establishes a viable long-term water supply?[28]

H. The Hearing

On February 14, 2006, all the parties were instructed to produce by February 24 the proposed settlement, supporting documents, and DRA's opposition testimony, with reply testimony due March 10, 2006. While DRA participated in the mediation, it objected to the proposed $1.98 million and the $5 million rate base increases as unreasonable, inconsistent with the law, and not in the public interest.[29] The proposed settlement was presented over DRA's objections on February 24, 2006, in a FVWC motion for Commission approval and adoption of the attached proposed settlement (PS). On March 13, 2006, an evidentiary hearing was held.

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[25] Scoping Memo in A. 05-10-005 et al., dated Dec. 14, 2005, at 3-4.

[26] *Id.*

[27] *Id.* at 3.

[28] *Id.* at 4.

[29] TR 86:4 – 87:15, J. Reiger/DRA.

1. Public monies granted FC

At the hearing, DHS testified that it was granting FVWC a $5.12 million in Drinking Water Treatment and Research Fund (DWTRF) and a $3.27 million State Revolving Fund (SRF) loan to meet the CRWQCB and DHS compliance orders.[30] The SRF loan would carry a zero interest cost over a term of 20 years because FVWC is regarded as serving a low-income disadvantaged area.[31]

2. City financing of the $1.98 million buy-in fee is assumed

FVWC urged the Commission to authorize adding the Sacramento City's financing of FVWC's $1.98 million buy-in fee to rate base as "plant" according to utility accounting practice.[32] However, the proposed settlement only "assumes the City of Sacramento will finance up to 1.13 million gallons per day (MGD) of the buy-in fee it charges via a 20-year financing agreement at the City of Sacramento's Pool A rate." [Emphasis added.] At the hearing, FVWC presented no evidence to prove the City financing was reasonable, e.g., an executed financing agreement. In rebuttal, DRA presented unrefuted evidence that such financing would not be necessary if the SRF loan is granted.[33]

3. Adding up to $5 million to rate base

FVWC testified that because shareholders are paying for the costs of the pollution lawsuit, any damages that FVWC receives from the litigation belong to FVWC and not the ratepayers. On that basis, FVWC claimed at the hearing, that when and if FVWC were to repay DHS for the DWTRF grant from damages won in the pollution lawsuit, up to $5 million of that repayment should be added to rate base.[34]

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[30] *See* TR. 76 – 77, C. Lischeske/DHS.

[31] Ex. 8, *DRA Reply Testimony* at 7-8.

[32] *D. 06-04-073* at 11, mimeo.

[33] TR 139:19 – 140:9, K. Evans/DRA

[34] TR 17–19, R. Cook Jr./FVWC and Ex. 1, Prop. Settlmt at 8.

The Commission rejected this proposal. Instead, the Commission authorized in advance of the pollution lawsuit outcome that up to $5 million of any damages awarded FVWC may be added to rate base, if such increase is due to infrastructure improvements that is paid for with such damages.[35] FVWC presented no evidence of the damages it could reasonably anticipate winning or when such an event would occur.[36] Although FVWC's damage awards are speculative, the Commission in D. 06-04-073 stated that "the public health and fire safety are likely to be affected this summer unless infrastructure is quickly improved."[37]

4. Assemblymember Dave Jones testifies.

At the hearing, DRA presented as one of its witnesses Assemblymember Dave Jones, who represents the Ninth Assembly district of California, which includes the ratepayers served by FVWC. Assemblymember Jones testified that as in the public participation hearing held on March 8, 2006, in this matter, he is participating in the hearing on behalf of his constituency to oppose the FVWC proposed $1.98 million and $5 million rate base increases.[38] He noted that these rate base increases would nearly double the present monthly rates, from approximately $15 to $30, and that most of his constituency are too poor to bear such rate shock.[39] According to Assemblymember Jones, it is unfair to allow FVWC to recover and earn a profit on these rate base increases, when FVWC has a history of neglecting improvements to the water system is not spending any of its own funds. Assemblymember Jones presented a letter from State Senator Deborah Ortiz in support of his position and introduced into evidence numerous

[35] D. 06-04-073, Order. Para. 3, at 25.

[36] TR 50:26 – 51:5, R. Cook Jr./ FVWC ("I am not going to speculate, because I don't know exactly who the defendants are and under what circumstances they might be held accountable.")

[37] D. 06-04-073 at 20.

[38] TR 32:24 – 33:16, D. Jones/ DRA (150 ratepayers attended the Mar. 8, 2006 PPH and most opposed FVWC).

[39] TR 31:13 –32:23, D. Jones/DRA and Ex. 2 (demographic analysis of the 9th Assembly district of CA).

ratepayer petitions in opposition to FVWC's settlement.[40] He proposed that the Commission bifurcate the proceeding to address the ratemaking issues in a separate hearing.[41]

I. The Commission issues its decision

After the parties filed their opening and reply briefs and comments on the proposed decision, the Commission on April 28, 2006, mailed to the service list, D. 06-04-073. As in the proposed decision, the Commission authorizes adding $1.98 million to rate base on the assumption that City is financing the buy-in fees. The Commission also decided in advance and at some future date when FVWC wins damage awards in its pollution lawsuit and spends those awards on infrastructure, up to $5 million of such damages may be added to rate base without FVWC having to prove reasonableness or prudency.

IV. AUTHORITIES AND ARGUMENTS

Pursuant to Rule 86.1, this Application for Rehearing specifically sets forth the following grounds on which the Applicants consider the order or decision of the Commission, D. 06-04-073, to be unlawful or erroneous.

A. The Commission decision to add $1.98 million to rate base is factually unsupported by the record and violates Commission policy and practices that requires a Utility to expend its own funds before recovering and earning a profit on rate base.

1. It is unreasonable to impose burdens on the ratepayers based on an "assumption" that FVWC will obtain the City of Sacramento financing for the $1.98 million of buy-in fees.

[40] TR 35:11 – 36:5, D. Jones/ DRA; Ex. 4, ratepayers petitions.

[41] TR 41:27 – 42:9 & 53:9 – 18, D. Jones/DRA ("[Bifurcation] would allow the proposed water pressure/water quality solution to go forward, but dealing separately with the ratemaking part of this proceeding.")

In D. 06-04-073, the Commission finds:

> Our order today permits rate-basing upon filing of an advice letter of the $1.98 million of the buy-in fee for the utility to receive purchased water from the City of Sacramento. We agree that a buy-in fee for purchased water is considered a non-depreciable addition to plant, and we exercise our discretion to authorize an offset rate increase for this legitimate addition to base that is immediately necessary and useful on behalf of ratepayers and that is financed with a city financing arrangement that must be paid by the utility.[42] [Emphasis added.]

According to the Scoping Memo in this matter, this proceeding is categorized as "ratesetting."[43] Section 1701.3, subsection (e), provides that in a ratesetting proceeding:

> The commission may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision based on evidence in the record. [Emphasis added.]

In this case, the Commission decision is not based on evidence in the record when it relies only on an assumption that City financing of the $1.98 million buy-in fee will occur, as stated by D. 06-04-073 as follows:

> The settlement assumes that the City of Sacramento will finance up to 1.13 million gallons per day of the buy-in fee it charges via a 20-year financing agreement, with 2.11 million gallons per day funded outright by the Drinking Water Treatment and Research Fund and a Safe Drinking Water State Revolving Fund loan.[44]

Without citing any facts of record except that "the settlement assumes," the Commission concludes that the $1.98 million buy-in fee "is financed with a city financing arrangement that must be paid by the utility." No FVWC witness testified that FVWC has executed a financing agreement with the City; applied for it; or stated any specific date or other circumstances when FVWC would likely apply for and/or receive

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[42] *D. 06-04-073* at 17, mimeo.

[43] Scoping Memo in A. 05-10-005 et al., dated Dec. 14, 2005.

[44] D. 06-04-073 at 9-10, mimeo, and Finding of Facts 19, "The City of Sacramento buy-in fee is considered to be plant under utility accounting practice."

City financing. For example, Troy Givans, who stated that he works in the Sacramento as a senior project manager in the Sacramento County Department of Economic Development and Intergovernmental Affairs, did not attest to the existence or likelihood of City financing.[45] Robert C. Cook Jr., an owner of FVWC, also did not claim that FVWC had City financing or when or how FVWC would obtain it.[46]

DRA testimony establishes that City financing would be unnecessary:

> And I was talking to Jim Pfeiffer. He said: well, there is no deal to finance the water. He said that when the Research Fund money comes in, that 3.7 million will be immediately given to the City; and that when the State Revolving Fund money comes in, the remaining 2 million will be paid from that. And that's -- he said: so it doesn't make any difference about the interest rate, because the total 5.7 will be paid up front.[47]

The Commission errs in giving no weight to DRA's testimony. The buy-in fees will amount to $5.7 million to buy 2.11 mgd.[48] Robert C. Cook Jr. corroborates DRA's testimony[49] above when he testified:

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[45] TR 7:8 – 8:6 and Tr. 65:15 –66:12, T. Givans/FVWC. The Commission mistakenly identifies Mr. Givans as the "director of housing development for Mercy Housing California." *See D. 06-04-073* at 16, mimeo.

[46] TR 24:3 – 14, R. Cook Jr./FVWC (When asked for the formula or calculation of the $4.38/month rate increase, Mr. Cook did not refer to any executed agreement or application of City financing, but referred Attachment D of Ex. 1, the proposed settlement, which is not an executed agreement or application.)

[47] TR 130:5 – 12, K. Evans/ DRA; Ex. 8, DRA Reply Test. at 13 ("when the SRF funding becomes secure, the remaining $2 million buy-in fee will be forwarded to the City of Sacramento and will complete paying the buy-in fee.")

48 Ex. 1 at 2, 3, and 9.

49 Tr. 140:4 – 9, K. Evans/ DRA:

> Again, Mr. Pfeiffer told me that 3.7 million is coming from the Research Fund, and that 2 million of the SRF funding will finish paying it off, such that there will be no need to have a financing of the 5.7, because it will be paid in full, assuming that the SRF funding comes through this summer.

See DRA ReplyTestimy at 13.

Q. Page 7 of the settlement agreement, it does say that if you receive a loan from the State Revolving Fund, those proceeds will pay for the 2.11 mgd buy-in, whereas on page 11 of the motion, it does say the funds from the state -- from the State Revolving Fund and the Drinking Water and Treatment Fund will be forwarded to the City.

A. That's right.

Q. So is -- will those funds come from both sources, or will they only come from the State Revolving Fund sources?

A. A portion of the $3.7 million will come from the Drinking Water Treatment Fund, and then the remainder of the $3.7 million will come from the State Revolving Fund.

FVWC 's testimony never explains specifically what the term "a portion" means. Notwithstanding this vagueness, the proposed settlement at page 7 and the FVWC motion at page 11 represent that the DWTRF funds will pay $3.7 million of the $5.7 million buy-in fee, and the remainder, or $2 million, will be paid for with SRF funds.

Therefore the Commission grievously errs to the detriment of the ratepayers. In D. 06-04-073, the Commission is assuming that City financing of the $5.7 million buy-fee will occur, when the record — e.g., the FVWC Motion, the proposed settlement, and FVWC testimony — prove that the City financing will be unnecessary or unlikely, because both DWTRF and SRF funds will be used and sufficient to pay the buy-in fee. In fact, the record shows that FVWC is receiving $5.12 million in DWTRF grants[50] and $3.27 million in SRF loans, which total to $8.39 million of public monies to deal with its water pressure and supply problems. As Carl Liescheske of DHS testified, "We estimate that between those two amounts, it will resolve the current capacity shortfall that the water system is experiencing."[51]

[50] TR 76:27 – 77:9, C. Liescheske/DHS.

[51] If FVWC does not spend these public monies as represented, then a serious question arises

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The record proves does not support that City financing is necessary or likely. Nevertheless, the Commission waives FVWC's burden to prove the reasonableness of such an assumption. This violates the Commission's legal duty to base its ratesetting decisions on the record. As a matter of fact, on May 2, 2006, FVWC filed an Advice Letter (AL) requesting increased tariffs based on D. 06-04-073's assumption of City financing. FVWC presented no proof of such financing in its advice letter. The Water Division has approved that AL and the ratepayers are now saddled with increased burdens, when the basis for those burdens FVWC's need to pay for City financing of buy-in fees – remains unproven. The Commission should grant a rehearing to correct this error.

2. The Commission has it backwards. FVWC must first expend its own funds on rate base before recovering and earning a profit on it at the ratepayers' expense.

In *Alisal Water Corp.*, D.90-09-044, mimeo at 11, as quoted in California Water Service Company, D.94-02-045, 53 CPUC 2d 287 (1994), mimeo at 14, the Commission held:

> [U]tilities should earn a return only on the money they invest . . . We found this policy superior to one which would allow utilities to earn a return on someone else's investment, whether it be plant [paid] for by the customers of the mutual water company being acquired, by customer donations, or by any other means.

In this case, the record shows that FVWC is not expending any of its own funds to pay the buy-in fees. FVWC will pay for the $1.98 million buy-in fee with City financing or State public monies, DWTRF or SRF. It is against Commission policy to have the ratepayers pay for FVWC's buy-in fees, without FVWC spending a dime of its own

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whether FVWC is unjustly enriching itself if cannot account for the spending of the DWTRF and SRF funds.

money for it. The Commission should therefore reject the Commission as inconsistent with its ratemaking policy stated in the *Alisal* decision.

Alternatively, even assuming *arguendo* that the City is financing the buy-in fee, the Commission errs in not treating such public financing for ratemaking purposes in the same manner as a SRF loan. The Commission in D. 06-04-073 holds that rate recovery of the SRF loan is permissible only via surcharges and not rate based.[52] The City financing of the $1.98 million is as much a public financing as the SRF loan. Therefore, rate recovery of the buy-in fee should only be by surcharges. As the Commission has not allowed FVWC to rate base and earn a profit on the SRF loan, the City financing of the $1.98 million should not be included in rate base. The Commission legally errs in treating the two types of public financing – State and local government – disparately.

3. The Commission erroneously justifies the $1.98 million as an "offset rate increase."

The Commission in D. 06-04-073 states, "we exercise our discretion to authorize an offset rate increase for this legitimate addition to base [i.e., the $1.98 million] that is immediately necessary and useful on behalf of ratepayers." As DRA Staff witness Kerrie Evans testified, "if it's [the offset rate increase] more than 25 percent of your annual income, we'd like you to come in and get authorization to do it." In this case, an offset rate increase to recover $1.98 million of revenue requirements exceeds 25% of FVWC annual income, which is approximately $1 million per year. Therefore, FVWC would have to apply for an offset rate increase. The Commission errs in applying the offset rate increase policy to FVWC, when D. 06-04-073 waives the requirement that FVWC has to show the reasonableness and justification for such ratemaking treatment.

B. The Commission errs in adding $5 million of speculative and future litigation recoveries to rate base.

52 See FVWC Op. Br. at 9.

1. FVWC should apply in a future Commission ratemaking proceeding to rate base its pollution lawsuit recoveries. The ALJ Ruling's reversal of the Commission is arbitrary, unreasonable, and not in the public interest.

The Commission initially decided that FVWC should seek to recover pollution damages as rate base in another and future ratemaking proceeding:

> [W]e do not preclude the utility from seeking appropriate recovery for that investment in its next general rate case or in another proceeding. We also do not preclude the utility from asserting, in an appropriate proceeding and based on then-existing facts, that a DHS grant that has been refunded by the utility is entitled to ratemaking treatment outside the prohibitions of D.06-03-015.

Inexplicably, the ALJ Ruling reverses the above holding, and the Commission adopts this change in D. 06-04-073. The Commission now has decided that up to $5 million may be added to rate based that is "attributable to infrastructure improvements through damages awarded in the pollution litigation shall earn a return of 10%."[53] The Commission justifies its rush to judgment because "public health and fire safety are likely to be affected this summer unless infrastructure is quickly improved."

The Commission has violated Section 1701.3, subsection (e), when D. 06-04-073 decides without any facts of record to prove that FVWC will win sufficient damages to increase rate base by up to $5 million or that FVWC will in fact spend its damage awards on infrastructure improvements. The Commission decision is not in the public interest when for the future, D. 06-04-073 waives FVWC's duty to show reasonableness and prudency on basis of evidence in the record, before increase rate base and thereby raise rates.

D. 06-04-073's Ordering Paragraph 3 is not based on the record. The decision has not shown how approving an increase to rate base in the future will address any purported exigencies now reasonably foreseeable. Further compounding the unreasonableness of

[53] Order. Para. 3, D. 06-04-073 at **

the Commission decision is that the record proves FVWC is responsible for its present infrastructure problems. Even though CRWQCB and DHS cited FVWC for violating water quality standards, FVWC made no capital investments in response. It is unfair to ratepayers to make them pay for the pay for errors and omissions of FVWC.

For example, it is difficult to understand how approving in May 2006 adding up to $5 million to rate base will ameliorate FVWC's summer plight, when the trial of the FVWC pollution lawsuit will not likely end during June through September 2006. The pollution lawsuit is a jury trial, involving over 20 law firms and more than a dozen major corporate defendants, which began testimony in late April 2006. It is equally unpredictable what FVWC's capital structure will be when the trial ends or when FVWC recovers any damages. These imponderables will certainly endure through the summer of 2006.

The Commission need not decide now the ratemaking issues that will be shaped by future and unknown events. This is not ratemaking but arbitrary, whimsical, and capricious decision making unjustified by any circumstances. The Commission should grant a rehearing in this case.

2. The record does not prove that if and when FVWC recovers in litigation $5 million, this amount belongs to FVWC's owners or to the ratepayers.

The Commission errs in assuming that $5 million of speculative and future litigation recoveries belongs to FVWC and not the ratepayers. The Commission is now deliberating on whether litigation recoveries won by a utility in a pollution lawsuit belong to the ratepayers or to the utility's owners, which as DRA stated in its Opening Brief is as follows:

> It is also premature to assume that all monies received from the pollution litigation should be assigned to shareholders. For example, in the San Gabriel Water-Fontana District rate case the issue of the allocation of monies received from lawsuits associated with water contamination is currently being decided. Although no final decision has been issued in the case, the Administrative Law Judge has already indicated

> to the parties that it would proposed to allocate 75% of the funds to ratepayers and 25% to shareholders. When and if FVWC were to receive any settlements or court awards, it should follow Commission processes and make the proper showing to increase rate base at that time.[54]

The Commission again violates Section 1701.3, subsection (e), when it decides in the absence of a full and complete record the ratemaking fate of the damage awards. For example, the ratepayers have been paying the depreciation recovery on wells that have 20 to 30 year life. Some of the contaminated wells may have been taken off line before their useful life has expired. The ratepayers are entitled to recover the depreciation they have paid from the damage awards. However, the Commission forecloses this possibility by deciding that all damage awards belong to FVWC. The Commission decision is therefore unreasonable, inconsistent with the law, and not in the public interest.

V. CONCLUSION

The Commission is imposing rate burdens on those who are least able to suffer rate shock of 112%, without any foundation in the record for the necessity of such inequities. The law requires the Commission to base its decision on the evidence of record. The Commission errs when assuming without a reasonable basis in the record that FVWC will obtain City financing of $1.98 million buy-in fee. The record does not support such an assumption but instead establishes that FVWC will use public monies, DWTRF and SRF, pay the buy-fee. Under any scenario – whether DWTRF, SRF, or City financing – FVWC is not expending any of its own funds to pay buy-in fee. Therefore, an additional reason for rehearing is that the Commission is violating its own policy and practice, by allowing rate recovery and profit-taking on rate base when the Utility has not paid for the rate base item.

Awarding FVWC up to a $5 million in rate base increase is as unreasonable, unlawful, and detrimental to the public as the buy-in holding stated above. The Commission errs in deciding this $5 million issue on basis of fortune-telling, i.e.,

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54 DRA Op. Br. at 16.

assuming an outcome of FVWC pollution lawsuit trial when even FVWC's own witness, Robert C. Cook Jr., refused to speculate on this event. This violates Section 1701.3, subsection (e), because Ordering Paragraph 3, D. 06-04-073, is certainly not based on any evidence of record, such as FVWC has won any damage awards. The Commission has also prematurely decided that any damage awards given to FVWC belong to FVWC, without affording ratepayers an opportunity to be heard and requiring FVWC to prove the reasonableness of its position.

Perhaps most dismaying is the lack of any necessity for the Commission engaging in ratemaking without a record. require these rate increases. The Commission fails to explain how the $1.98 million rate base increase or the future $5 million increase will affect FVWC's public health and safety concerns during the summer of 2006. It is implausible that the $4.38 rate increase resulting from the $1.98 million rate base addition will have any discernible impact on health and safety issues in June through September 2006. Further, FVWC will not receive any damage awards within the next several months. The Commission has unnecessarily and without support in the record rushed to judgment. The ratepayers will suffer unjust rate increases as a result. Based on the above, the Applicants urge the Commission to grant this Application for Rehearing.

Respectfully submitted,

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May 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "**THE** DIVISION OF RATEPAYER ADVOCATES' APPLICATION FOR A REHEARING" in A**pplication 05-10-005 et al**. by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

[ ] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **May 30, 2006**, at San Francisco, California.

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Rebecca Rojo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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